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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1933

No. 106

W. D. SANDERS, PETITIONER,

vs.

ARMOUR FERTILIZER WORKS AND NATIONAL FIRE INSURANCE COMPANY.

SUPPLEMENTAL BRIEF OF PETITIONER W. D. SANDERS.

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Of Counsel.

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The answer of Armour Fertilizer Works to our petition, as we construe it, does not attempt to justify the reasoning of the Circuit Court of Appeals below in rendering judgment for it, so much as it attempts to assert that a correct result was reached. Without attempting at this time to make an exhaustive reply to Armour's contention, which should be developed fully upon a hearing on the merits of the case, we wish to point out that, as we see it, none of the reasons given in our original petition as grounds for the issuance of the writ of certiorari prayed for herein has been refuted. These reasons are:

1. It is important that this Honorable Court determine, once and for all, the effect of an inchoate garnishment proceeding, further prosecution of which has been permanently

enjoined prior to final judgment. The Federal Interpleader Act is of comparatively recent enactment. In *Cole* v. *Cunningham* this Honorable Court determined that such a proceeding was not entitled to full faith and credit where the court enjoining its prosecution obtained its jurisdiction to do so by reason of its control over a citizen of the same State. Is the result to be any different where jurisdiction for injunction is conferred by the Federal Interpleader Act? In other words, is the effect to be given to an inchoate proceeding to depend on the reason for which it was stopped, rather than on its own finality and merit so far as prosecuted? This question will doubtless arise many times in the future, and a controlling precedent should be set up by this Honorable Court to avoid further useless expense and litigation.

2. The Circuit Court said, in effect, that in an interpleader suit a Federal District Court may, at its option, disregard the procedural laws of the forum. This assertion is in our judgment very dangerous and wholly without precedent. Armour has made no attempt to defend it. Counsel did say, in the third paragraph of their answer, that they denied that a Federal District Court sitting in Texas in an interpleader action was to be regarded as a Texas court. They cited no authority and made no argument in support of that position. The position is clearly untenable and we submit that this Honorable Court should not permit this statement of the Circuit Court to stand in the records with the tacit approval of this Honorable Court.

3. The Circuit Court held, in effect, that the Federal Courts had the right to disregard the interpretation placed upon Illinois law by the Supreme Court of that State, and to substitute therefor its own interpretation of such law. This statement is likewise contrary to established authority and should be rejected by this Honorable Court.

4. It is important that this Honorable Court clarify, once and for all, the true character of a garnishment proceeding, making it clear that such proceeding is not strictly a proceeding *in rem*, but is a proceeding *in personam* with jurisdiction dependent not upon any fictitious situs of a debt, but upon the court's getting personal jurisdiction over the debtor.

It is not our purpose to undertake in this answer to reply fully to all of Armour's contentions, but we do wish to point out certain premises and interpretations of the facts of this case made by Armour which to our mind are clearly erroneous.

The major contention urged by Armour in support of their alleged right to the interpleaded fund is that the default order assessed against Sanders in the Illinois Court was a final judgment. It cannot be said that this is urged in support of the judgment below, because even the majority of the Circuit Court expressly found that such default order was not a final judgment (Opinion, page 4). In fact, Armour does not even venture to assert in unqualified terms to this Honorable Court that the judgment is final. Their statement as to its alleged finality is always qualified by some such expressions as "for the purpose of attachment and garnishment action," or "as between Armour and Sanders." The question is not whether the Illinois proceeding had reached a stage where that court would not have permitted Sanders (who was not personally before the court) to come in and defend his rights, but whether it had rendered a *final judgment* in the case. We did not argue this point to this Honorable Court in our original brief herein further than to point out that the Circuit Court conceded that the judgment was not final, and to refer very briefly to some of the authorities on the point. It is clear from the record that the Illinois court did not have personal jurisdiction over Sanders, and hence that the default

order could not be binding as a personal judgment. The Illinois court had caused a writ of garnishment to be issued against the insurance companies, but on September 19, 1927, when this default was ordered against Sanders, the answer of Hartford Fire Insurance Company was on file (record pages 107-110) admitting it had issued policies to Sanders and that there had been a fire, but denying that it owed any money to Sanders. The National Fire Insurance Company did not answer until June 27, 1928, at which time it admitted an adjustment of the dispute between it and Sanders as to its liability and admitted a debt of $3,400 to Sanders, but plead that that debt was exempt from garnishment. On the same date (June 27, 1928) Hartford Fire Insurance Company amended its answer and admitted their indebtedness of $4,250, which sum it also claimed was exempt. It is true that Sanders stipulated (Record, page 86) that Sanders' homestead exemption would not have been recognized by the Illinois court as a good defense to the garnishment suit. From this Armour argues that it was the duty of the Texas court to render the same judgment on the record before it that the Illinois court would have rendered. To this we reply that there was no duty on the Texas court to try the case according to Illinois law. On the contrary, the Texas court was bound to apply Texas law to its decision. However, even if the Texas court had wanted to try the case on the Illinois record, it did not have sufficient data upon which to do so. It did not know what other attachments, if any, were returnable to the same term of the Illinois court. Again, as we have pointed out in our brief, the institution of a garnishment proceeding did not confer upon Armour a vested right to a final judgment thereon, even in Illinois. We refer the court to pages 33-35 of our original brief.

Without replying further here to Armour's argument that the default against Sanders was a final judgment, we

refer the court to pages 9-19 of our brief in the Circuit Court of Appeals. In comment, however, upon the quotation set out on page 12 of Armour's brief from the case of *State Bank of Chicago* v. *Thweatt*, 111 Ill. App. 599, which quotation counsel concludes with the sentence: "Such a judgment was not a final one in the sense that the original attachment cause was disposed of, but only final as to the defendant to the extent stated, and was not final as to the garnishee," we would call the court's attention to the concluding sentence of the paragraph from which this quotation was taken, reading as follows:

> "Its finality *all* depended upon facts thereafter to be shown which establish the court's jurisdiction to proceed to *final judgment*."

In view of the controlling effect of the last sentence over the whole paragraph and of its adverse effect upon Armour's contention, it seems to us that counsel would have been fairer to this Honorable Court, as well as to the Court quoted from, had they completed the quotation.

We are not sure that we understand counsel's statement on page 5 of their brief reading as follows:

> "It was stipulated at the trial of the instant case (R. 86) that the Texas exemption law was no bar in Illinois to the binding effect of the Illinois judgment on the insurance credits attached."

We have never conceded that there was an Illinois judgment binding on the insurance credits attached.

Counsel is also mistaken as to our conceding that, if Armour's Illinois judgment were final, the insurance money should properly be awarded to Armour. In our petition to this Honorable Court we stated (page 7) that we believed that the decision of this Honorable Court in *Cole* v. *Cunningham*, 133 U. S. 107, 33 L. Ed. 538, reading in part as follows:

> "The Constitution did not mean to confer any new power on the States, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of the States domestic judgment to all intents and purposes, but only gave a general validity, faith and credit to them as evidence. No execution can be issued upon such judgments without a new suit in the tribunals of other States and they enjoy, not the right of priority or privilege or lien which they have in the State where they are pronounced, but that only which the *lex fori* gives to them by its own laws, in their character of foreign judgments."

was applicable to the case at bar. We believe that the default order against Sanders at best is only entitled to such remedies as are allowed by the law of the forum (Texas) and not to the remedies allowed by the law of Illinois.

In commenting upon counsel's argument that Sanders is seeking to avail himself of the rights of the garnishees rather than his own rights, we reply that it was the duty of the garnishees if they wished any Illinois judgment to be a protection to them, to plead in Illinois that the funds sought to be garnished were exempt to Sanders as proceeds of his homestead, 28 *C. J.* 399. The garnishees did set up this defense, and that defense has never been passed upon by the Illinois court. What the Illinois court would have done had the case come on for final determination is immaterial. As we have pointed out, the Texas court was not bound by Illinois law, and did not even have the complete Illinois record before it. Armour is asking, not merely that the Texas court decide a Texas lawsuit according to Illinois law, but also that it speculate as to what facts would have been presented to the Illinois court.

We do not believe that a bankruptcy case such as *Metcalf v. Barker*, cited by Armour, has any applicability to the case at bar. The bankruptcy act does not undertake to in-

validate a lien or a garnishment proceeding which has been instituted prior to bankruptcy, even though it be completed after bankruptcy. Neither this case nor the case of *King* v. *Cross*, so strongly relied on by Armour, furnishes any authority for the proposition that an inchoate garnishment proceeding, which can never be prosecuted to final judgment, is entitled to recognition in Texas as a final judgment.

We are not confused, as suggested by Armour, by the distinction between the creation and the enforcement of liens. Our position is that a lien is not created by filing suit, nor is any vested right acquired by the institution of a garnishment proceeding. The right acquired by the institution of such suit is only inchoate, and does not become perfected—it is not created—until it has been prosecuted to final judgment. As we have pointed out on page 33 of our brief herein, the perfection of such right may be defeated in several different ways before it has finally vested.

We are unable to understand Armour's position in arguing to this Honorable Court on page 33 of its brief that the executory waiver of exemption contained in the notes sued upon in Illinois (Record, page 90) should be construed as a waiver of his right to claim that the fire insurance proceeds of his homestead were exempt from garnishment under Texas law. The Constitution of the State of Texas, Article 16, Section 50, expressly provides:

> "No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided, whether such mortgage, or trust deed, or other lien, shall have been created by the husband alone, or together with his wife; and all pretended sales of the homestead involving any condition of defeasance shall be void."

In view of this mandatory Constitutional provision, which is well known to practically every Texan, whether lawyer

or layman, we do not understand how Armour can argue on page 31 of its brief that Sanders must be held to have expressly waived and renounced his homestead exemption. There is no contention that Sanders has done anything after the fire indicating any intention or willingness on his part to waive his right to have the insurance proceeds exempt from attachment. Certainly it is a far cry to undertake to give to the promissory note executed in 1926 the effect of a waiver of exemption of insurance money on the homestead when Sanders did not have the legal capacity to waive his homestead exemption at that time. In 25 *Corpus Juris* 111, the statement is made:

> "It is a rule, nearly universal; based on reasons of public policy, that a debtor's waiver of his exemption right, by stipulation of an executory contract, is absolutely void."

We do not find that the question has ever come up for decision in an appellate court in Texas, which is not surprising in view of the express mandatory language of the Constitution.

Our surprise at this concluding argument of Armour is all the greater when we contrast it with the admission contained on page 28 of Armour's brief:

> "In so far as concerns the controversy in the instant case, it may be conceded that the Texas exemption law is a bar to the successful prosecution of a garnishment action against the insurance credits within the State of Texas;".

We believe that the majority of the Circuit Court, who were not familiar with the utter impossibility of an executory waiver of homestead exemption in Texas, were possibly subconsciously influenced against the merits of Sanders' position by this argument about a waiver, even though it was wholly untenable. We can see no other reason for

its inclusion in the brief to this Honorable Court than the hope of possibly a like effect.

In conclusion, we respectfully submit that for the reasons stated in our original petition, this Honorable Court should grant the writ of certiorari prayed for therein, and that upon final hearing hereof it should reverse the judgment of the Circuit Court of Appeals, and affirm the judgment of the District Court.

Respectfully submitted,

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